Peabody Coal Company *and* International Union, United Mine Workers of America. Case 14–CA–15383

October 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 14, 1982, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Peabody Coal Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT make changes in the wages, hours, or other terms or conditions of employment of the warehouse clerks at our Will Scarlet surface mine, Stonefort, Illinois, without first giving International Union, United Mine Workers of America, a chance to discuss and bargain about such proposed changes.

WE WILL NOT refuse to bargain with the Union named above as the exclusive collective-bargaining agent of our Will Scarlet surface mine warehouse clerks by granting them wage increases and other improved benefits without first giving that Union a chance to bargain with us about such changes.

WE WILL NOT discriminate against our employees by granting wage increases and other benefit improvements to our nonunionized employees while withholding those benefits from our employees who are represented by a union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL immediately put into effect for the warehouse clerks at our Will Scarlet surface mine the increases in overtime and holiday pay, the dental and vision care benefits, and the October wage increase which were given at various times during 1981 to the warehouse clerks in our other mines in Illinois; and WE WILL make these benefits effective retroactively.

WE WILL make whole, with interest, the warehouse clerks at our Will Scarlet surface mine for all losses they suffered as a result of our withholding the 1981 increases in wages, overtime, and holiday pay, and dental and vision care benefits.

PEABODY COAL COMPANY

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me on March 9 and May 10, 1982, at St. Louis, Missouri.

The Union, International Union, United Mine Workers of America,[1] filed an original charge against the Em-

[1] The Union's designation appears as amended *sua sponte* by me. This is done to conform the Union's name to a recent relevant decision of the *Continued*

ployer, Peabody Coal Company, on September 28, 1981.[2] The charge was amended on October 28. On November 2, the Regional Director for Region 14 of the Board issued a complaint and notice of hearing. The complaint was amended at the hearing. In substance, the complaint alleges the Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by telling its employees certain employment benefits were denied them because they selected the Union as their agent for collective bargaining, and by promising those employees increased benefits and other improvements in working conditions if they would repudiate the Union.

Also, the complaint (as amended) alleges the Employer discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act at various times between April 17 and December 1 by granting increased overtime, holiday, and vacation benefits, by instituting dental and optical plans, and by granting a wage increase to some of its employees while, at the same time, denying such improved benefits to the employees who were represented by the Union.

Finally, by the grant of the aforementioned benefits without consultation or bargaining with the Union, the Employer is alleged to have refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

The Employer filed a timely answer which admitted certain matters but denied the substantive allegations and that it had committed any unfair labor practices.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, to examine and cross-examine witnesses,[3] to present oral argument, and to file briefs. Counsel for General Counsel and the Employer's counsel submitted post-trial briefs, the contents of which have been carefully considered. No separate brief was received from the Union.

Upon consideration of the entire record, the briefs, and my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Jurisdiction is uncontested. The Employer is a corporation duly authorized to do business under the laws of the States of Missouri and Illinois. Its principal office and place of business is located at 301 North Memorial Drive, St. Louis, Missouri. The Employer is engaged in the mining of coal. For the conduct of this business, the Employer maintains a variety of facilities in numerous States. One of these mine facilities is located at Rural Route 1 in Stonefort, Illinois. That facility is known as the Will Scarlet Surface Mine (hereinafter called Will Scarlet). Will Scarlet is the only facility involved in this proceeding.

The Employer admits that, during the year ending September 30, it mined at Will Scarlet coal valued in excess of $50,000, of which coal valued in excess of $50,000 was shipped from that facility directly to points located outside Illinois.

As observed in footnote 1, *supra*, the Board asserted jurisdiction over the Employer in at least one earlier proceeding.

The Employer admits, the record reflects, and I find it is and, at all material times, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Employer admits, the record reflects, and I find the Union is and, at all material times, has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The recitation of facts found below is based upon a composite of the credited aspects of the testimony of all witnesses, unrefuted oral testimony, supporting documents, undisputed evidence, and careful consideration of the logical consistency and inherent probability of events.

Not every bit of evidence, or every argument of counsel, is discussed. Nonetheless, I have considered all such matters. Omitted material is considered irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict the findings of fact, that evidence has not been overlooked. Instead, it has been rejected as incredible or of little probative worth. *Bishop and Malob, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

My credibility resolutions, wherever necessary, have been based upon my observation of witness demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inference which may be drawn from the record as a whole. *Northridge Knitting Mills, Inc.*, 223 NLRB 230 (1976); *Warren L. Rose Castings, Inc. d/b/a V & W Castings*, 231 NLRB 912 (1977); *Gold Standard Enterprises, Inc.; et al.*, 234 NLRB 618 (1978).

A. *Background*

On January 19, 1981, the Board's Regional Director for Region 14 certified the Union as collective-bargaining representative of the employees in the following unit:

> All warehouse clerks employed at the Employer's Will Scarlet Surface Mine, excluding office clerical and professional employees, warehouse managers, guards and supervisors as defined in the Act, and all other employees.

The record reflects the Union represents the production and maintenance employees at the Will Scarlet facility and at other of the Employer's mines. However, the only

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National Labor Relations Board (the Board) reported at 259 NLRB 1409 (1982). Therein, the Union (as I have identified it) was held to be the collective-bargaining representative of the unit employees involved in the instant case. Thus, this amendment corrects an apparent inadvertent incorrect designation of the Charging Party as certified.

[2] All dates hereinafter are in 1981 unless otherwise stated.

[3] Pursuant to an agreement among counsel, all witnesses were sequestered throughout the proceedings except Yates Storts (the Employer's superintendent and admitted supervisor) and John Cox (the Union's International organizer).

warehouse clerks who are represented by the Union, or any other labor organization, are those located at the Will Scarlet facility.

The Employer challenged the validity of the certification. Thus, it filed a timely request for review with the Board. That request was denied. Thereafter, the Union, on January 29, requested recognition and bargaining. By letter of February 6, the Employer refused the Union's request. The Employer asserted that, according to the terms of the 1978 National Bituminous Coal Wage Agreement, representation of the warehouse clerks in the unit found appropriate is not within the Union's jurisdiction.

Upon a charge docketed as Case 14–CA–14724, an unfair labor practice hearing was conducted before Administrative Law Judge John C. Miller.

Administrative Law Judge Miller held, *inter alia*, that he was bound by the prior Board proceedings in the earlier related representation case[4] with respect to the validity of the certification. Accordingly, Administrative Law Judge Miller held the Employer's admitted refusal to recognize and meet with the Union constituted a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

As noted above, the Board affirmed Administrative Law Judge Miller's findings in 259 NLRB 1409. The Board also affirmed Administative Law Judge Miller's conclusions that the Employer's Will Scarlet superintendent, Ron Menzie, committed a variety of so-called independent violations of Section 8(a)(1) of the Act. Those violations consisted of threats of loss of seniority and employment, interrogation of employees concerning their union sympathies and support, questioning employees as to how they voted in the underlying representation election, solicitation of employees to withdraw their support of the Union, and promising employees more favorable job consideration if they would withdraw their union support.

The entirety of the Board's Decision and Order, 259 NLRB 1409 currently is pending before the U.S. Court of Appeals, Sixth Circuit, upon the Employer's petition for review.

The last date on which Menzie was found to have committed the 8(a)(1) violations was March 2.

B. *The Present Dispute*

1. The facts

The instant allegations directly emanate from a series of events which began on April 16. On that date, the Employer announced adoption of a policy for overtime payments and a uniform method of payment for holidays, vacation,[5] and time off (G.C. Exh. 8).

Documentary evidence, supported by undisputed oral testimony, shows that the new policy increased the compensation for nonexempt salaried employees. The parties stipulated the subject unit employees are salaried. It is undisputed that those employees are within the nonexmpt category. Thus, compensation was increased from 1-1/2 times to double an employee's base rate for overtime worked on a seventh consecutive workday;[6] and holiday pay for working on holidays was increased from 1-1/2 times to triple an employee's base rate.

The increased overtime and holiday pay first became known to the unit employees in late May or early June. At that time, Menzie still was superintendent at the Will Scarlet location.[7]

Warehouse clerk Donald R. Emmons testified credibly that he spoke to Menzie sometime in June. Emmons' memory concerning all the details of that conversation was imprecise. Nonetheless, the composite of Emmons' testimony, and that of another warehouse clerk, Lori Wahls, whom I credit because of her forthright, comprehensive, and precise narrations, reveals that Menzie had been confronted by Emmons in June concerning the Employer's new overtime and holiday pay policy. Wahls and the Employer's accounting supervisor, Edna Fields, were present during the conversation between Emmons and Menzie.[8]

In salient part, Emmons said he knew the new policy had been applied to warehouse clerks at two other of the Employer's mines.

Menzie responded that "this doesn't pertain to you guys because you're trying to get into the Union."

Emmons then asked to see a copy of the policy. Menzie said Emmons could not see it because it was classified. Fields suggested they contact the Employer's St. Louis headquarters. Menzie left the scene. He returned after a brief absence. Menzie then said, "They [the Employer's St. Louis officials] said until you guys are officially in the Union, you're still company employees and you're going to be treated as such." The June conversation concerning the subject of overtime and holiday pay ended when Menzie made the comment last quoted above.

The record shows that warehouse clerk Jerry Casteel had not received the new benefits for time worked on New Year's Day and Independence Day after the effective date of the new benefits. Also, Casteel did not receive the increase when he worked a seventh consecutive day after the new benefit's effective date.

Effective August 1, Yates Storts succeeded Menzie as superintendent at the Will Scarlet facility. Storts first came to that location the previous March. He functioned as production superintendent until August 1.[9]

In August, the Employer announced new dental and vision care insurance programs for salaried employees. September 1 was the effective date of each of these programs. Each program was announced to be fully funded by the Employer. The Employer acknowledges these plans were instituted for and applicable to the warehouse clerks at its Illinois mines other than Will Scarlet.

In late August or early September, Casteel, Wahls, Emmons, and other Will Scarlet employees Jerry Robin-

[4] 259 NLRB 1409 at 1413.

[5] As will be seen below, there is only evidence of overtime and holiday pay increases, but no change in vacations.

[6] Overtime was defined as "all hours worked over 8 hours per day and 40 hours per week."

[7] As previously observed, Menzie was prominent in the previous unfair labor practice proceeding.

[8] Neither Menzie nor Fields appeared as a witness before me.

[9] Storts was the sole witness presented to testify on behalf of the Employer.

son and Donald Richardson met with Storts. Emmons arranged the meeting.[10]

Casteel was the principal employee spokesperson. Each of the participants, including Storts but except Robinson, testified. Casteel presented the most comprehensive employee version.

Casteel's direct and cross-examination contain significant differences. My analysis of Casteel's direct testimony regarding the dialogue between Storts and himself leads me to conclude that such direct testimony reflects a tendency to exaggerate what Storts supposedly said to portray the facts in a light most favorable to the General Counsel and the Charging Party. Nonetheless, Casteel is not discredited. The general parameters of his direct testimony were corroborated or were left uncontested by other witnesses who, at times, included even Storts.

Casteel's cross-examination was more moderate in its description of what Storts said in critical areas.

Storts presented only direct examination. It was extremely brief. It was rather limited. Storts' testimony was designed to show that it was Casteel who initiated inquiries as to how the employees might receive the newly installed benefits, rather than Storts' suggesting the receipt of benefits was conditioned upon repudiation of the Union.

Both counsel for the General Counsel and the Union's counsel declined the opportunity to cross-examine Storts. I find Casteel's cross-examination narration comports with Storts' testimony of what he said. Moreover, though Storts was present during all opposing testimony, including Casteel's, I perceived no effort by Storts in demeanor or otherwise to couch his testimony in blatant contradictions. Instead, I found Storts candid and forthright.

Upon the foregoing, my factual findings as to the Storts confrontation are a composite of the testimony presented by all witnesses to the event, except that Storts' account has been adopted wherever material conflicts appear between his testimony and that of Casteel.

I find, in relevant part, the Casteel-Storts conversation proceeded as follows: Casteel said the employees "were aware" of the overtime policy change. Casteel asked why the Will Scarlet unit employees were not receiving the new benefits. Storts replied he did not know, but would check into it.

Emmons and Casteel referred also to the existence of the recently announced dental and eyeglass benefits. Casteel, during cross-examination, testified that Storts indicated he was not aware the unit employees were not receiving the new overtime benefits—that he would check into it.

Casteel and other employee witnesses testified that whenever Storts said anything he would qualify it as his personal opinion. Storts remarked that he was a new superintendent. Further, Casteel acknowledged Storts said he (Storts) "wasn't familiar with the situation but figured they were "in limbo" because we voted the Union in January—still unresolved and company probably didn't know what to do with us because it appeared nothing doing to get them into the Union."

Wahls testified, in agreement with Storts, that Casteel asked what would happen if the employees decided to "stay" or "go" company.

Storts responded, "I do not know."

Casteel then queried, "if we would go by company, drop the cards, would our pay be retroactive back to the signing of the cards?"

Storts answered, "I do not know myself, but when that happens or whatever happens, I will get to the person in to answer your question."

As to the atmosphere engendered during the meeting, Wahls characterized Storts as "very, very kind and very nice and very helpful to us and he said he really didn't know." Wahls claimed that it was Casteel who asked "what if we decide to stay company—when do our benefits start—who should we tell." According to Wahls, Storts responded "you can tell me," then Casteel asked when the benefits would start and Storts replied "from the day you tell me or shortly thereafter."

Emmons, whose testimony I adopt in this connection because of clarity and consistency developed during cross-examination, testified the meeting with Storts ended when Storts said "that it really didn't matter whatever we wanted to do, either way."

No further conversations were held between any unit employee and Storts concerning the overtime, holiday, dental, or vision benefits.

Richardson testified that (presumably after September 1, the effective date of the dental plan) he was told the dental plan did not cover him.

With respect to the wage increase, the parties agreed that all warehouse clerks at the Employer's Illinois mines received varying percentage merit increases, except the warehouse clerks on salary continuation at all Illinois mines and further except the warehouse clerks at the Will Scarlet facility. It was agreed, also, that the wage increases were given sometime in December 1981 and were retroactive to sometime in October 1981. Further, it was agreed that the only warehouse clerk at Will Scarlet who was on the salary continuation at relevant times was Wahls, who was paid a salary continuation from September 13 for a period of 6 months, at which time her employment was terminated in accordance with established company policy.

The record reflects that the Union received no notice of the Employer's intention to grant any of the benefits to the salaried employees, nor was the Union consulted regarding the grant of the October wage increase. Cox testified, without contradiction, that neither he personally, nor the Union, received any notice that a wage increase would not be given to any of the warehouse clerks at Will Scarlet.

2. Analysis

a. *The refusals to bargain*

The General Counsel and the Union contend that the Employer refused to bargain when it unilaterally instituted the April increases in overtime and holiday payments,

[10] Emmons' recollection of the date as February 1982 is attributed to his demonstrated poor recall of dates. All other witnesses, including Storts, testified the meeting occurred in August or September 1981.

the September dental and optical plans, and the October wage increases for all its warehouse clerks except those within the bargaining unit at the Will Scarlet facility.

The Employer does not contest the evidence which shows, as I have found, each of the subject benefits in fact was implemented as alleged. Also, it is undisputed that no notice of an intention to institute those benefits, nor invitation to discuss or consult about them, was given or extended by the Employer to the Union.

Instead, the Employer contends it was privileged to make the benefit changes as part of its announced and extant program of challenging the validity of the Union's certification as collective-bargaining representative of the Will Scarlet warehouse clerks. Indeed, the Employer, in effect, has interposed a defense to the alleged unilateral changes herein identical to that made in the original refusal to recognize and bargain proceedings reported at 259 NLRB 1409.

The Employer further claims the wage and benefit changes were made in good faith. Its pure intention, the Employer argues, is demonstrated by the limitation of the benefit changes to the warehouse clerks situated away from Will Scarlet. Also, it is contended that withholding the benefit changes from the Will Scarlet warehouse clerk unit employees virtually was required in order for the Employer to preserve the integrity of its challenge to the Union's certification.

Finally, the Employer claims a decision in the case at bar should be deferred until the Sixth Circuit renders its judgment upon the pending action which challenges the certification.

I find merit to the General Counsel's and the Charging Party's mutual position. An employer is under an obligation to bargain with an incumbent union before it may permissibly make unilateral changes in terms and conditions of employment comprising mandatory bargaining subjects. *Guerdon Industries, Inc., Armor Mobile Homes Division*, 218 NLRB 658 (1975).

Contrary to the Employer's contention, I do not consider the refusal-to-bargain allegations before me necessarily are governed by principles identical to those involved in its challenge to the certification. Instead, I am guided by the law apposite to alleged refusals to comply with bargaining obligations *at a time when an outstanding certification of representative exists.*

For purposes of the resolution of refusal-to-bargain issues before me, the challenge to the certification is of little probative value. The Board already has spoken to that matter in 259 NLRB 1409. I am bound to follow such precedent, unless overruled by the U.S. Supreme Court (*Insurance Agents' International Union, AFL-CIO (The Prudential Insurance Company of America)*, 119 NLRB 768, 773 (1957)). This rule applies even in the face of contrary courts of appeals determinations. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963). Accordingly, I reject the Employer's plea to defer issuance of a decision herein.

It is clear an employer assumes the risk of being found guilty of an unfair labor practice if it makes unilateral changes in terms and conditions of employment concurrent with its pending challenge to the validity of a certification. *Madison Detective Bureau, Inc.*, 250 NLRB 398, 399 (1980); *Allstate Insurance Company*, 234 NLRB 193 (1978). The instant case provides a strong basis for application of this concept because the Board has concluded the certification is valid. In less compelling situations, the Board has declared an employer's perilous position regarding unilateral changes. Thus, such changes in employment terms and conditions are vulnerable to being declared unlawful when made during the period that objections to a representation election are pending and the final Board determination has not yet been made. *King Radio Corporation, Inc.*, 166 NLRB 649, 652 (1967); *Laney & Duke Storage Warehouse Co., Inc., et al.*, 151 NLRB 248, 266–267 (1965), enfd. in relevant part 369 F.2d 859, 869 (5th Cir. 1966). To defer a decision on the merits would, in my view, tend to proliferate the undesirable effect of bypassing, undercutting, and undermining the Union's certified status as the statutory collective-bargaining representative of the subject unit employees.

In considering whether or not the actions taken by the Employer herein constituted unilateral changes in violation of Section 8(a)(5) and (1) of the Act, it is instructive to note the Board's decision in *Pan-Abode, Inc.*, 222 NLRB 313 (1976). There, the Board, at 315, declared:

> In order for General Counsel to prove a *prima facie* case with respect to an alleged violation to Section 8(a)(5), he need only prove that an obligation to bargain under Section 9(a) existed and that Respondent refused to bargain either directly or did not bargain by unilaterally effecting a change in working conditions. Not only is Respondent's motivation in instituting such changes totally irrelevant in determining the existence of a violation under Section 8(a)(5), but such considerations may, as alleged in this case, provide the predicate for finding the same actions violative of other sections of the Act.

In the case at bar, the evidence shows the changes in overtime and holiday compensation,[11] the institution of the dental and vision plans, and the wage increase effective October were established, promulgated, and implemented after the Board certified the Union.

It is further acknowledged that Respondent did not give notice to, or bargain with, the Union prior to the effectuation of any of these changes. I conclude these factors satisfy the requisite elements of a violation set forth in *Pan-Abode, Inc., supra.*

The General Counsel contends the Board's decision in *Sweetwater Hospital Association*, 226 NLRB 321 (1976), applies herein. I agree. There are material factual similarities between the two cases. In both cases, there existed an earlier refusal to bargain based upon the claim of inappropriate certification. In both cases, the employers granted wage increases to all employees except those who chose union representation. In *Sweetwater Hospital*, the Board held the unilateral wage increase to violate

[11] The complaint (par. 7(a)) alleges a unilateral increase in "vacation days." Inasmuch as no evidence was adduced to support this allegation, I shall recommend its dismissal.

Section 8(a)(5) and (1) of the Act. See also *The Catholic Medical Center of Brooklyn, and Queens, Inc., etc.*, 236 NLRB 497 (1978).

The Employer, in its brief, seeks to distinguish the *Sweetwater Hospital* and *Catholic Medical Center* cases from the case at bar. The Employer correctly notes the cited cases involved employers who effectuated the unilateral changes at only a single facility. Thus, the Employer submits those cases are not properly applied to its "multi-mine operation in Illinois." I consider this argument fallacious. The making of the unilateral changes in working conditions of unrepresented warehouse clerks at mines other than Will Scarlet does not remove the inherent vice of denigrating from the Union's representative status. The record shows that the Will Scarlet warehouse clerks maintained, at least, frequent telephone contact with their counterparts at other mines. That contact is precisely how they became aware of some of the unilateral changes. Moreover, the Union represents the production and maintenance employees at Will Scarlet and other of the Employer's facilities. It is unrealistic to imagine that the unlawful unilateral activity would escape the attention of other of this Employer's employees at Will Scarlet and other locations. Thus, the knowledge of the Employer's conduct readily can be shown to exacerbate the proscribed effect of undermining and undercutting the certified bargaining agent. Viewed in this light, the separation of facilities becomes irrelevant.

Such a view also diminishes the Employer's good-faith claim. The predicate for such claim is the absence of direct evidence that the Employer did not actively publicize the unilateral changes. Such forebearance is illusory. In the posture of all the circumstances herein, there was no need to make explicit and widespread announcements of the changes in order for their full impact to be felt. The employees themselves naturally became unwitting vehicles for extending the proscribed effect of the unlawful conduct. In any event, the Employer's good faith is not material herein. *Amsterdam Printing and Litho Corp.*, 223 NLRB 370 (1976); *Chatham Manufacturing Company*, 172 NLRB 1948 (1968).

Upon all the foregoing, I find that the Employer refused to bargain in violation of Section 8(a)(5) and (1) of the Act by withholding the overtime and holiday payment changes, the dental and vision insurance plans, and the October wage increase from the Will Scarlet warehouse clerks and instituting those benefits without notice to the Union or giving the Union a chance to bargain about those changes.

b. *The threats and promises*

The so-called independent 8(a)(1) violations arise from the conference Storts held with Casteel and the four other Will Scarlet warehouse employees in late August or early September.

Specifically, it is alleged that Storts unlawfully told these unit employees the benefit changes (already discussed) had been denied to them because they selected the Union to represent them. Also, the complaint alleges Storts promised those employees better benefits and working conditions if they would repudiate the Union as their collective-bargaining representative.

Storts is an admitted supervisor at all material times. If remarks of statutory supervisors possess a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their statutory rights, they are violative of Section 8(a)(1). *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492 (1979), citing *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

The General Counsel claims Storts' remarks during the meeting with employees bore the requisite unlawful tendency. The Employer contends everything Storts said was an expression of personal opinion, speculative and privileged as employer free speech within the purview of Section 8(c) of the Act. This issue is a close one, not free from doubt. Its resolution depends upon how the Storts-employee meeting is reconstructed. My findings do not comport fully with the litigants' portrayal of events, which, of course, are perceived by them from an adversarial position.

I have found that the meeting was initiated by the warehouse clerks. Storts, the only management official present, occupied his then-current position for approximately only 1 month. In fact, the record shows no connection by Storts with the Will Scarlet facility before March. The Union already had been certified. Storts was not involved in the Employer's preelection campaign, nor in any of the earlier 8(a)(1) activity commited solely by Menzie.

The meeting was convened expressly for the purpose of the employees making inquiry regarding their status. Casteel first asked why the warehouse clerks were not receiving the new benefits. Storts said he did not know. He volunteered to obtain an informative answer.

Continued discussion of specific benefits, such as the dental and vision plans, elicited responses uniformly and explicitly qualified by Storts as his personal opinion. Storts actually reminded the employees that he was a new superintendent. He repeatedly made offers to obtain the requested responses to the employees' questions.

With respect to the allegations that Storts imputed the failure to receive the benefits to the advent of the Union or its election as collective-bargaining representative of the Will Scarlet warehouse clerks, even Casteel testified Storts said he "wasn't familiar" with the reason the benefits had been withheld and Storts "figured" (synonymous with "speculation") the employees were "in limbo" because they had selected the Union as their bargaining agent. Storts immediately sought to explain the latter comment. In doing so, he noted the election was still unresolved (apparently a reference to the certification challenge) and that the Employer "probably" did not know what to do. Arguably, Storts' attempted self-exoneration may be interpreted as an effort to blame the Union for the failure to receive benefits. As indicated, viewed in its totality, I believe the meeting requires a different conclusion.

The Storts-employee conference continued. Casteel then asked what would be the effect of the employees' changing their minds about union representation. Storts again said he did not know. He continued to avoid positive responses.

With regard to Storts' alleged promise of benefits, the credited version of what was said shows that (1) it was Casteel who raised the issue by asking whether the pay raise would be retroactive if the employees decided to drop the cards (meaning the Union), and (2) Storts said he did not know but would obtain someone who could answer the question. Storts did venture the view that the withheld benefits might start virtually simultaneous with the employees' advice they no longer desired the Union to represent them. In the complete context of the meeting, I do not conclude this last-reported comment rises to an unlawful promise of benefits. It was attended by too many other qualified responses. It was easily susceptible to being no more than Storts' personal view.

Storts' attitude throughout the meeting was graphically described by Wahls. She asserted Storts was "kind," "very nice," and "very helpful." The general atmosphere was punctuated with Storts' obvious ignorance of the circumstances and of the official positions of superior management.

Finally, Storts ended the meeting by telling the employees "it really didn't matter" what they did. In this context, I conclude it requires a strained interpretation of the credited events to find Storts engaged in the alleged 8(a)(1) conduct. Counsel for the General Counsel has cited impressive precedent to support the complaint allegations. These cases are *Florida Steel Corporation*, 220 NLRB 260 (1975), *Lammert Industries, a division of Componetrol, Inc., etc.*, 229 NLRB 895 (1977); *American Telecommunications Corporation, Electromechanical Division*, 249 NLRB 1135 (1980); *Commercial Management, Inc. d/b/a Continental Manor Nursing Home*, 233 NLRB 665 (1977); and *K & K Transportation Corp., Inc.*, 254 NLRB 722 (1981).

I find each of these cases distinguishable. In general, the alleged unlawful comments in the cited cases were a part of an employer program unquestionably designed to dissuade employees from union activities; the remarks were made during confrontations generally convened by the management officials, not the employees; the speaker ostensibly was making authoritative statements; and the speaker grasped every chance to drive home the unlawful message. I do not find these elements present in the case at bar. The only similarity is that the employees asked questions regarding their status or benefits. Perhaps it would have been better for Storts not to talk with the employees at all. However, it is clear that the employees regarded him as a friend and confidant. Their perception is consistent with my previously described observations of Storts' demeanor and deportment.

My overall impression of the Storts-employee meeting and the credited accounts of Storts' remarks does not persuade me that they reasonably tend to produce the effect proscribed by Section 8(a)(1). Accordingly, I shall recommend dismissal of the allegations of paragraph 5 of the complaint.

c. *The discrimination*

The General Counsel advances two theories of violation of Section 8(a)(3) and (1). First, it is argued that the withholding of the various benefits, already discussed at length, from the warehouse clerks at Will Scarlet comprises a *per se* violation. Second, it is asserted that the Employer's action is a continuation of its earlier unlawful conduct as found by the Board in 259 NLRB 1409. As such, it is claimed the discrimination allegation is separately supported by independent evidence of antiunion motivation.

The Employer argues the record is devoid of discriminatory evidence and that its actions in granting the benefits to all its Illinois warehouse clerks except those at Will Scarlet was a lawful means of preserving its legal challenge to the validity of the Union's certification.

With respect to the *per se* theory, the General Counsel correctly states the general rule that an employer violates Section 8(a)(3) and (1) when it varies from its established practices of granting wage increases and other benefit improvements because of the pendency of a representation campaign or because a labor organization has been elected by its employees to represent them for collective-bargaining purposes. The General Counsel relies on *Florida Steel Corporation*, 220 NLRB 1201 (1975); *Associated Milk Products, Inc.*, 255 NLRB 750 (1981); and *Henry Vogt Machine Company*, 251 NLRB 363 (1980).

Each of the cited cases, in fact, does sustain the general principle expounded by the General Counsel. However, those cases (and the precedent cited within them) make it clear that the finding of violation is based upon a showing that the benefits withheld *would have been granted in the normal course of the employer's business*, absent the advent of a union (e.g., 220 NLRB at 1203). Thus, in all three cases cited by the General Counsel there existed affirmative evidence that the employer had altered its former and established practices of granting benefits in withholding those benefits from groups of employees who had elected unions to represent them.

In contrast, the record before me contains no evidence whatsoever concerning the Employer's history of reviews and grants of increases in wages, overtime, and holiday pay; nor is there evidence of any history relative to the institution of other benefits such as the dental and vision care plans. No one testified as to any such history. None of the documentary evidence announcing the dental and vision benefits and containing the personnel policies on overtime and holiday pay provides any clue as to the history of such benefits. The October wage increase evidence consists only of agreements among counsel upon the facts regarding that particular increase. No reference was made to the Employer's prior grants of wage increases. On the state of this record, I must conclude there is insufficient evidence to which I can apply the cited legal doctrines. Accordingly, I find no merit to the *per se* theory.

The immediately foregoing conclusion does not put the discrimination issue to rest. A trier of fact may infer motive from the total circumstances proved. If the trier of fact "finds that the stated motive for a [personnel action] is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362

F.2d 466, 470 (9th Cir. 1966). See also *Heath International, Inc.*, 196 NLRB 318 (1972). I conclude the record as a whole gives rise to an inference that all the subject benefits were withheld from the Will Scarlet warehouse clerks because they elected the Union as bargaining agent, and to discourage their union activity.

The Employer has cited no cases, nor have I uncovered any, which support its arguments in defense of the discrimination allegations.

There are two factors which are impressive indicators of the Employer's motivation. First, there is the background evidence consisting of the Board's findings in 259 NLRB 1409 of a variety of 8(a)(1) conduct. As previously observed, all such violations were committed by Menzie.

Second, there is new evidence of persistent antiunion motivation in the instant proceeding. That motivation is specifically connected to the withholding of the earliest instituted benefits. This evidence consists of Emmons' unrefuted testimony that, when he asked Menzie, in June, why the overtime and holiday pay benefits were not received by the Will Scarlet warehouse clerks, Menzie answered, "this doesn't pertain to you guys because you're trying to get into the Union." Menzie was the Will Scarlet superintendent when he made this statement. I can think of no more direct and cogent evidence of union hostility[12] than Menzie's words, addressed expressly to the failure to grant the overtime holiday pay benefits to the subject employees.

It is true there is no such direct evidence relative to the dental and vision plans or to the October wage increase. Menzie had been replaced when the latter benefits were announced and granted, and I have exonerated Storts from 8(a)(1) conduct. Nonetheless, the evidence shows the Employer has been consistent and unwavering in its challenge to the Union's certification. No evidence has been presented to show that the Employer's position has changed since issuance of the Board's decision in 259 NLRB 1409. Indeed, the Employer substantially defends the instant action with the claim that its conduct was a necessary adjunct to the maintenance of the integrity of the certification challenge.

Upon the foregoing, I infer that the motivation underlying the withholding of the overtime and holiday benefits also was the underlying consideration in the admitted failure to subsequently confer benefits upon the Will Scarlet warehouse clerks. Accordingly, I find the Employer discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act by withholding all the subject benefits from the Will Scarlet warehouse clerks.[13]

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

[12] I do not hold Menzie's statement to constitute a separate violation of Sec. 8(a)(1). It has not been so alleged and, as noted, Menzie did not appear as a witness.

[13] In making this finding, I have also considered, and relied on, the disparate character of the benefits' grant to all the nonunionized warehouse clerks. Such disparity is further evidence of unlawful motivation.

CONCLUSIONS OF LAW

1. Peabody Coal Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehouse clerks employed at the Employer's Will Scarlet surface mine, excluding office clerical and professional employees, warehouse managers, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Employer refused to bargain collectively in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act by withholding the overtime and holiday payment changes, the dental and vision plans, and the October 1981 wage increase from the Will Scarlet warehouse employees without notice to the Union or giving the Union an opportunity to bargain about those changes.

5. The Employer did not interfere with, restrain, or coerce its employees in violation of Section 8(a)(1) of the Act as alleged in paragraph 5 of the complaint.

6. The Employer discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act by withholding the increases in overtime and holiday pay, the dental and vision insurance plans, and the October 1981 wage increase from the Will Scarlet warehouse clerks while granting those benefits to its other warehouse clerks located in Illinois.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. There is no evidence to support a finding that the Employer unlawfully granted or withheld vacation benefits from any of its employees.

THE REMEDY

Having found that the Employer violated Section 8(a)(5), (3), and, derivatively, (1) of the Act, I shall recommend that it cease and desist therefrom and affirmatively take such action as will dissipate the effects of its unfair labor practices.

To remedy the Employer's failure to bargain with the Union, the Order shall require the Employer to give the Union an opportunity to bargain over proposed changes in terms and conditions of employment of said unit employees.

Because the Employer discriminatorily withheld the various stated benefits from the aforesaid unit employees, it shall be ordered to grant the overtime and holiday pay increases, the dental and vision benefits, and the October wage increase to the Will Scarlet warehouse clerks, retroactively to the date each such benefit was effective for the Employer's warehouse clerks at its other Illinois locations. Also, the Order shall require the Employer to make whole, with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977) (see, generally, *Isis Plumbing & Heating Co.*, 138

NLRB 716 (1962)),[14] the Will Scarlet warehouse clerks by payment to each of them all moneys lost as a result of the discriminatory withholding of each of the benefits specified in the immediately preceding sentence. This make-whole provision is intended to be applicable even if my findings of 8(a)(3) violations are not affirmed. Such a remedy is equally appropriate to remedy the type of 8(a)(5) violation found in this case. *Charmer Industries, Inc., et al.*, 250 NLRB 293, 294 (1980); *Southside Electric Cooperative, Inc.*, 243 NLRB 390, 392 (1979).[15]

Notwithstanding the Employer's contentions its conduct was governed by a desire to promote its challenge to the certification in its best posture, I conclude the Employer's repetition of the refusal-to-bargain violation, coupled with the addition of the conduct found discriminatory herein, demonstrates such a proclivity to violate the Act and a blatant disregard of the employees' Section 7 rights as to warrant application of the Board's standard for broad proscriptive language. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Therefore, the Order shall require the Employer to refrain from, in any manner, interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, Peabody Coal Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with International Union, United Mine Workers of America, by unilaterally, and without notice to or bargaining with, the Union, making changes in the wages, hours, or other terms and conditions of employment of the employees in the collective-bargaining unit found appropriate herein.

(b) Discriminating against its employees by withholding from its Will Scarlet warehouse clerks overtime and holiday pay increases, dental and vision care plans and benefits, wage increases, and other benefits granted to its nonunionized warehouse clerks.

(c) Interfering with, restraining, or coercing its employees in any manner in the exercise of their Section 7 rights.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Give International Union, United Mine Workers of America, as the exclusive collective-bargaining agent of the employees in the unit found appropriate herein, the opportunity to bargain over proposed changes in the wages, hours, and other terms and conditions of employment of the employees in said unit.

(b) Grant to the employees in said appropriate bargaining unit the overtime and holiday pay increases, the dental and vision benefits, and the October wage increase, and make each of those benefits retroactive to the date in 1981 each such benefit was effective for the Employer's warehouse clerks at its locations in Illinois other than the Will Scarlet facility.

(c) Make whole, with interest computed as set forth in the section above entitled "The Remedy," the said unit employees for the monetary losses they suffered as a result of the Employer's refusal to bargain and discrimination found herein.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to analyze and determine the amount of money due under the terms of this Order.

(e) Post at its Stonefort, Illinois, facility copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by the Employer's authorized representative, shall be posted by the Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

[14] Also *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[15] Wahls' status as a "salary continuation" employee presumably makes her ineligible to share in the October wage increase. Any doubts as to Whals' entitlement to the wage increase can be resolved, if necessary, in the compliance stage of these proceedings.

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."